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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 74

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

and

PACIFIC MOTOR TRUCKING CO., and GENERAL MOTORS CORPORATION,
Appellees.

On Appeal from the United States District Court for the District of Columbia

Motion to Affirm on Behalf of Appellees Pacific Motor Trucking Company and General Motors Corporation

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Appellees, Pacific Motor Trucking Company and General Motors Corporation, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal, pursuant to 28 U.S.C., § 1253, from the final decree,[1] dated January 30, 1959, of a specially constituted three-judge District Court, which dismissed on the merits[2] appellants' complaint to set aside an order of the Interstate Commerce Commission.

Appellants are certain motor carrier trade associations and motor carriers. The Commission's report and order under attack, dated September 9, 1958 (J.S. Appendix B), granted a motor contract carrier permit under section 209(b) of the Interstate Commerce Act (49 U.S.C. § 309(b)) to Pacific Motor Trucking Company (referred to herein as PMT) to transport automobiles and trucks to various points hereinafter described from the plants of General Motors Corporation (hereinafter referred to as GM), situated in Oakland, Raymer[3] and South Gate, California. PMT is a wholly-owned motor common and contract carrier subsidiary of Southern Pacific Company (herein referred to as SP), which is a common carrier by railroad

1. The court's decree and opinion are set forth as Appendix A to the Jurisdictional Statement (referred to herein as J.S.). A temporary restraining order was denied by the court after hearing and on November 24, 1958, permits authorized by the Commission's order sought to be set aside herein were issued (J.S. 26).

2. A majority of the court also dismissed the complaint on the further ground that the plaintiffs lacked standing to sue (J.S. 39-41). In this connection they found (J.S. 40):

> "* * * Not only is the complaint devoid of any allegation of direct injury, present or threatened, to the motor carrier plaintiffs by granting of the extension of operating authority to PMT, but, at the hearing on the merits, there was no showing of actual or anticipated direct injury such as would entitle them to bring this action."

While appellants attack this holding (J.S. 4, question 5; 17-19), in view of the demonstrable insubstantiality of their case on the merits, we submit that there is no occasion for this Court to consider the propriety of such holding.

3. Raymer and South Gate are in the Los Angeles area.

operating in California, Nevada, Oregon, Utah, Arizona, New Mexico and Texas. Both PMT and GM were permitted to intervene as defendants in these proceedings. The Jurisdictional Statement was received by them on May 25, 1959.

In its opinion the court correctly summarized PMT's present operations and the proceedings before the Commission which led to this litigation as follows (J.S. 24-26):

> "PMT since December 10, 1935, has held contract carrier operating authority from the Railroad Commission of California for intrastate operations within that State. The Interstate Commerce Commission (hereinafter referred to as the Commission) has issued to PMT four prior contract carrier permits for transportation of new automobiles, new trucks, and new buses, in initial movements in truckaway and driveaway service (1) from Oakland, California, to the non-rail point of Hawthorne, Nevada, and Nevada rail points on the Southern Pacific (MC 78787, Sub. 23, issued June 20, 1944); (2) from Los Angeles, California, to Calexico and San Ysidro, California, both on the Mexican border (MC 78787, Sub. 27, issued April 21, 1950); (3) from Raymer, California, to points in the Los Angeles Harbor Commercial Zone, for transshipment by water (MC 78787, Sub 30, issued June 22, 1950); and (4) from Oakland, California, to Carson City and Minden, Nevada, both being non-rail points (MC 78787, Sub 31, issued June 21, 1955). PMT's only shipper under these permits has been GM. Thus, prior to filing of the four new applications involved in this case, the Commission had issued to PMT contract carrier operating authority from GM plants in California for physically interstate service across the state line into Nevada, and for foreign commerce physically within California.
>
> "The order complained of grew out of extensive proceedings before the Commission following the filing of the four applications by PMT, seeking to extend its service as a contract carrier for GM in the Pacific Coast

area for the transportation of a single commodity, new automobiles and trucks. In general, by the Sub 34 application, PMT sought to extend its contract carrier service from the two GM Chevrolet plants at Oakland, California, to all Oregon points which are stations on SP; by the Sub 35 application, the right to serve three additional non rail points in Nevada from Oakland, California; by the Sub 36 application, to serve all Arizona points which are stations on SP; and by the Sub 37 application, authority to round out its service areas from the Oakland and Raymer plants to include all points in the seven states of Washington, Oregon, Idaho, Nevada, Utah, Arizona, and New Mexico, whether or not they are stations on SP, and to begin new service from the Buick-Oldsmobile-Pontiac plant at South Gate, California, to a seven-state area, namely, Washington, Oregon, Idaho, Nevada, Utah, Arizona, and Montana. The four sub-proceedings were finally consolidated in Sub 37, from which the order complained of emanated. All of the plaintiffs in this action, who had been protestants in one or more of the other sub-numbers, participated in the consolidated proceeding before the Commission.

"By the order here under attack, the Commission granted the authority sought in the Sub 35 proceeding, service from the Oakland plant to three additional non-rail points in Nevada, which had been opposed by only one protestant, not a party to this action; but as to the Sub 34, 36, and 37 applications, the Commission denied entirely the authority requested to serve destinations in states not served by SP (Washington, Idaho, and Montana) and limited the authority granted to destinations in the other states (Arizona, Nevada, Oregon, Utah, and New Mexico) to points located on the rail lines of SP. Thus, the Commission's order granted only a limited portion of the authority sought in the four applications, and issuance of the new permits thereunder was conditioned on curtailment of existing common carrier authority to transport automobiles and trucks."

ARGUMENT

I. The Commission Expressly Followed the Construction of the National Transportation Policy Only Recently Approved by This Court as to Entry by Rail Subsidiaries into Motor Common Carrier Operations in Restricting PMT to Service to Points on the Rail Lines of SP; Its Refusal to Impose Other Usual Restrictions Imposed in Similar Common Carrier Situations Was Based Not on Any Departure from That Policy or Because of "Special Circumstances", but Solely on the Fact That Such Restrictions Would Have Converted These Operations Into Common Carrier Operations and Thus Have Been Beyond the Commission's Power to Impose Under Section 209(b) of the Interstate Commerce Act as It Existed Both Before and After the 1957 Amendment.

In *American Trucking Associations, Inc. v. United States*, 355 U.S. 141 (1957), this Court held that while the underlying policy of section 5(2)(b) of the Interstate Commerce Act[4] and the national transportation policy[5] must be considered in applications of rail subsidiaries for new common carrier motor vehicle certificates, nevertheless the Commission might, where "special circumstances" existed, grant a certificate without restrictions designed to keep the motor service auxiliary and supplemental to rail service.

Briefly stated, the gist of appellants' argument in support of questions 1, 2 and 4 (J.S. 3, 6-12, 14-17) is that the Commission's decision is in conflict with the national transportation policy and the above decision of this Court in that it here granted an unrestricted permit to PMT when "special circumstances" were not found to exist. The basic flaw

4. 49 U.S.C. § 5(2)(b). This section is set out in full as Appendix D, pp. 91-93, J.S. The pertinent portion provides that the Commission shall not authorize a railroad or its affiliate to acquire a motor carrier unless it finds that "the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

5. Set forth in Appendix D, J.S. 91.

in this argument is that appellants' description of the rights granted PMT as "unrestricted" (J.S. 6) is patently incorrect. Instead, it is obvious that the Commission applied the national transportation policy, as construed in the *American Trucking Associations* case, to the contract carrier situation before it, and, because "special circumstances" were not found to exist, it restricted[6] PMT's permit to service to points on the rail lines of SP. Such restriction was expressly described by the Commission (J.S. 69) as one of "the restrictions usually imposed in common carrier certificates issued to rail carriers or their affiliates in order to insure that the service rendered thereunder shall be no more than that which is auxiliary to or supplemental of train service." In addition, the Commission imposed a further restriction reserving the right to impose in the future any restrictions or conditions which may then appear to be necessary or desirable in the public interest (J.S. 71).

Our above characterization of the Commission's action is quite apparent from the following excerpt from its decision (J.S. 68-71):

> "After careful study we are impelled to disagree. Our statutory authority to impose terms and conditions in permits issued under section 209 is derived from part (b) of that section, and not from section 5 (2) (b). The rejection by the Commission of a similar contention with respect to section 207 in *Rock Island Motor Transit Co. Com. Car. Application*, 63 M.C.C. 91, 100, was sustained by the United States Supreme

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6. With the minor exception that service was authorized from the Oakland plant to Austin, Tonopah and Yerington, Nevada, which are not on the lines of SP. However, as to such points the record clearly shows that there were "special circumstances" (i.e. special need) within the meaning of the *American Trucking Associations* case, *supra*, because such points were not on the lines of any railroad (Sub. 35 proceedings, R. 74), and because none of plaintiffs protested such application or even had authority to operate between such points (J.S. 63-65).

Court on December 9, 1957, in *American Trucking Assns., Inc., v. United States*, 355 U.S. 141, subsequent to the argument in these cases. Therein the Supreme Court held that the Congress did not intend the rigid requirement of section 5 (2) (b) to be considered as a limitation on certificates issued under section 207 but added, pages 151-152):

> 'that the underlying policy of § 5 (2) (b) must not be divorced from proceedings for new certificates under § 207. Indeed the Commission must take "cognizance" of the National Transportation Policy and apply the Act "as a whole". But for reasons we have stated we do not believe that the Commission acts beyond its statutory authority when in the public interest it occasionally departs from the auxiliary and supplementary limitations in a § 207 proceeding.'

"Although the Court, in that proceeding, was dealing only with applications for common-carrier certificates, we think that undoubtedly the same principle applies here where contract-carrier permits are sought and in reaching the conclusions above indicated; namely, that some authority should be granted in each proceeding; we have, in fact, given due consideration to the national transportation policy and to the principles which underlie section 5 (2) (b). (Emphasis added.)

"While we have power to impose restrictions in any permit granted authorizing motor contract carrier operations, such action is not required by either section 5 (2) (b) or the provisions of the national transportation policy; and it remains to be considered next whether any restrictions should be imposed here. *The restrictions usually imposed in common-carrier certificates issued to rail carriers or their affiliates in order to insure that the service rendered thereunder shall be no more than that which is auxiliary to or supplemental of train service are:* (1) the service by motor vehicle to be performed by rail carrier or by a rail-

controlled motor subsidiary should be limited to service which is auxiliary to or supplemental of rail service, (2) *applicant shall not serve any point not a station on the railroad,* (3) a key-point requirement or a requirement that shipments transported by motor shall be limited to those which it receives from or delivers to the railroad under a through bill of lading at rail rates covering, in addition to the movement by applicant, a prior or subsequent movement by rail, (4) all contracts between the rail carrier and the motor carrier shall be reported to the Commission and shall be subject to revision if and as the Commission finds it to be necessary in order that such arrangements shall be fair and equitable to the parties, and (5) such further specific conditions as the Commission, in the future, may find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service. *However, if warranted by special circumstances, certificates have been issued without these restrictions to railroads or their affiliates, whether acquired by purchase * * * or as the result of an application filed under section 207 * * *.* (Emphasis added.)

"* * * On the other hand, we do not believe that Congress intended, except in unusual circumstances, to allow any railroad, through the medium of a motor subsidiary, to provide all-truck service as a contract carrier in competition with other rail lines and independently operated motor carriers without safeguards to insure that such service shall not be broader in scope than its rail operation. *In the absence of any showing of unusual conditions in these proceedings, any permits issued to applicant will contain a territorial limitation of the service authorized to points which are stations on the Southern Pacific Railroad. Also a restriction is warranted reserving to the Commission the right to impose in the future any restrictions or conditions which may then appear to be necessary or desirable in the public interest.*" (Emphasis added.)

The District Court clearly agreed that the Commission had followed the policy of the *American Trucking Associations* case and that it had not granted unrestricted authority to PMT. Thus, it said (J.S. 36, 37-38):

> "The Commission concedes that the rationale which requires a reading of the Act as a whole and consideration of the policy underlying § 5(2)(b) as a guiding light in the issuance of § 207 common carrier certificates is equally applicable to the granting of § 209(b) permits for contract carrier operations * * *.
>
> "* * * The extended operations authorized, however—far from being 'unrestricted' operations by PMT in the contract carrier field, as the plaintiffs have consistently referred to them—were restricted in many respects. The authority granted was limited to points already served by SP (so as not to affect adversely other railroads carrying GM traffic beyond SP to other rail points), and limited to points on the rail line of SP (so as not to cut in on territory which potentially might be served by independent motor carrier protestants), subject to the condition that 'the permits authorizing such operations should be issued upon receipt of a written request from applicant for the imposition of a restriction against the transportation of automobiles and trucks' in its outstanding common carrier certificates (in the interest of avoiding the possibility of dual motor carrier operations), and the further condition 'that there may from time to time in the future be attached to the permits granted such reasonable terms, conditions and limitations as the public interest and national transportation policy may require'."

The Commission's refusal to impose other restrictions usually imposed where motor common carrier operations by a rail subsidiary are involved in order to limit the service to that which is supplemental or auxiliary to train service was clearly based not on any departure from the policy ex-

pressed by this Court in the *American Trucking Associations* case nor on the existence of "special circumstances". Instead, it was plainly based on the simple fact that such restrictions would have converted these operations of PMT into common carrier operations and would therefore have been beyond the power of the Commission to impose under section 209(b) of the Interstate Commerce Act. This is apparent from the following excerpt from the Commission's decision (J.S. 69-71):

> "* * * The restrictions usually imposed in common-carrier certificates issued to rail carriers or their affiliates in order to insure that the service rendered thereunder shall be no more than that which is auxiliary to or supplemental of train service are: (1) the service by motor vehicle to be performed by rail carrier or by a rail-controlled motor subsidiary should be limited to service which is auxiliary to or supplemental of rail service, (2) applicant shall not serve any point not a station on the railroad, (3) a key-point requirement or a requirement that shipments transported by motor shall be limited to those which it receives from or delivers to the railroad under a through bill of lading at rail rates covering, in addition to the movement by applicant, a prior or subsequent movement by rail, (4) all contracts between the rail carrier and the motor carrier shall be reported to the Commission and shall be subject to revision if and as the Commission finds it to be necessary in order that such arrangements shall be fair and equitable to the parties, and (5) such further specific conditions as the Commission, in the future, may find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service * * *.
>
> "It has long been recognized by this Commission that substituted motor service in lieu of rail operations constitutes common carriage. *Substituted Freight Service*, 232 I.C.C. 683; *Willett Co. of Indiana, Inc., Extension—*

Ill., Ind., and Ky., 21 M. C. C. 405; *Louisiana, A. & T. Ry. Co. Common Carrier Application*, 22 M. C. C. 213; *Hagerty Contract Carrier Application*, 26 M. C. C. 413, and *Siebert Extension—Woodbury and Elmer, N. J.*, 34 M. C. C. 340. In the two last-cited proceedings, the applicants sought permits to transport less-than-carload freight between stations on a railroad. Neither applicant proposed to have direct dealings with the general public, and each proposed to dedicate his equipment to the railroad exclusively. In each instance the proposed operations were found to be those of a common carrier, and the applicants therein were granted certificates limited to service auxiliary to or supplemental of rail service. *Since substituted service is common carriage at rail rates and on rail billing, all of the restrictions usually employed to apply to substituted motor-for-rail service could not be imposed in a permit, for to do so would be to command the holder to render a common-carrier service. We conclude, therefore, that there is no basis for imposing the usual restrictions numbered 1, 3, or 5 in any permits which may be granted in these proceedings.*" (Emphasis added.)

The reason why the imposition of these usual conditions attached in motor common carrier cases must necessarily have converted these operations of PMT into common carrier operations is quite apparent from the Commission's decision in *Willett Co. of Indiana, Inc., Extension—Ill., Ind., and Ky.*, 21 M.C.C. 405, 409 (1940), one of the cases cited in this connection in the instant report. There the Commission observed that coordinated rail-motor service, that which results when, as in that case, the usual auxiliary and supplemental restrictions are imposed, "could only be accomplished through the medium of through routes and joint rates. * * *" Under section 216(c) (49 U.S.C.

§ 316(c))[7] of the Interstate Commerce Act only through routes and joint rates between railroads and common carriers by motor vehicle are authorized. There is no provision authorizing such between railroads and contract carriers. Appellants' argument thus leads to the absurd result that they would have the Commission attach restrictions commanding SP and PMT to do that which they cannot lawfully do under section 216(c) unless PMT be considered a common carrier as to these operations.

Under the clear language of section 209(b) of the Interstate Commerce Act the Commission had no power to impose restrictions which would have converted these operations from contract carrier to common carrier operations. Thus, both before and after that section was amended by Public Law 85-163, enacted on August 22, 1957 (71 Stat. 411),[8] it provided that the Commission shall attach to the permit "reasonable terms, conditions and limitations consistent with the character of the holder as a contract carrier." The District Court properly held[9] that the Commission was obligated to apply the new specific criteria, set forth in the 1957 amendment, in determining public interest and applying the national transportation policy (J.S. 32) and concluded (J.S. 33):

> "The order here challenged shows on its face that the Commission did consider those criteria, making findings with respect to each of them."

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7. This section provides:
"(c) Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; * * *"

8. Section 209(b), as amended, is set forth in Appendix D to the Jurisdictional Statement, pp. 94-95.

9. *Ziffrin, Inc. v. United States*, 318 U.S. 73, 78 (1943).

But nowhere in either the Commission's or the District Court's decisions is there any suggestion that the 1957 amendment was intended to alter the Congressional policies regarding rail entry into the motor carrier field. Consequently, question numbered 4,[10] which appellants seek to raise, regarding the propriety of such a construction is simply not before this Court. In any event, however, any requirement which may be read into the broad and general terms of the national transportation policy, that the Commission must attach auxiliary and supplemental restrictions in a particular case must yield to the more specific requirement of section 209(b) that it cannot attach restrictions which are inconsistent with the status of the applicant as a contract carrier.

II. The Commission Thoroughly Considered the Propriety of Permitting Dual Operations by PMT as a Common and Contract Carrier Under the Policy of Section 210 of the Interstate Commerce Act. Its Ultimate Finding That Such Dual Operations Were Permissible Is Rationally Supported by Adequate Subordinate Findings for Which There Is Substantial Support in the Evidence and Is Therefore Conclusive Upon the Court.

The argument in this section is in refutation of appellants' argument, in connection with question numbered 3, that the Commission failed to carry out the policy evidenced by section 210 of the Interstate Commerce Act.

Section 210 of the Interstate Commerce Act (49 U.S.C. § 310), so far as pertinent, provides:

> "Unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and a

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10. See J.S. 4, 14-17. This question, sought to be raised by appellants, is:

> "Whether the 1957 amendments to the provisions of the Interstate Commerce Act, Part II, dealing with motor contract carriers, were intended to alter the Congressional policy against rail entry into the motor carrier field?"

permit may be so held consistently with the public interest and with the national transportation policy declared in this Act—

* * * * * * *

"(2) no person, or any person controlling, controlled by, or under common control with such person, shall hold a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over a route or within a territory, if such person, or any such controlling person, controlled person, or person under common control, holds a certificate as a common carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory."

Contrary to appellants' contentions, the Commission thoroughly considered questions arising under this statutory provision (J.S. 71-73) and made the following ultimate finding (J.S. 73-74):

"We further find that the holding by applicant of the permits granted herein and those heretofore issued, and of the certificates heretofore issued to it authorizing common carrier operations in the same territory, and the holding by Southern Pacific Transport Company[11] of the certificates heretofore issued to it, will be consistent with the public interest and the national transportation policy."

In support of this ultimate finding the Commission in its report discussed the matter at length as follows: (J.S. 71-73), wherein are set forth its subordinate findings:

"The prior report in the Sub 34[12] proceeding fully discusses the dual operation question and needs little

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11. Another motor-carrier subsidiary of SP. Technically, the Commission was not required to consider the operations of this company, since it does not operate "over the same route or within the same territory" as PMT, within the meaning of section 210. The fact that it did so is another indication of the thorough consideration which it gave to the dual operations issue.

12. Set forth as Appendix C, J.S. 81.

enlargement or repetition. The issue was argued extensively previously and the argument here is not convincing that a different conclusion is warranted. Another wholly-owned motor carrier subsidiary of Southern Pacific, Southern Pacific Transport Company, holds certificates in No. MC-30319 and various sub-numbers thereto authorizing substituted motor-for-rail service auxiliary to or supplemental of the rail operations of Southern Pacific and those of an affiliated rail line, Texas & New Orleans Railroad Company, generally over regular routes between specified points in Texas and Louisiana. The additional dual operations occasioned by the grants of contract-carrier authority herein would not be such an aggravation of the existing dual operations of applicant or between applicant and the commonly controlled Texas subsidiary as to require disapproval. Compare *Texas Auto Transports, Inc., Contract Carrier Application*, 62 M.C.C. 473, 479, and *Complete Auto Transit, Inc.—Extension, Willow Run*, 71 M.C.C. 383, 388.

"As indicated, the granting of the instant applications would allow applicant to serve the same shipper both as a contract and common carrier by motor vehicle and, through its parent, as a common carrier by rail. In the 54-page consolidated certificate issued to applicant in No. MC-78786, dated July 27, 1956, the 32 different commodity descriptions grouped together under an alphabetical key on sheets 37 through 39 include the descriptions 'general commodities, except * * * assembled automobiles' in descriptions F, K, L, Z-1, and Z-6, and 'general commodities' with no exceptions referring to assembled automobiles and trucks in descriptions D, H, J, N, S, T, U, Y, Z, and Z-3. Applicant has indicated its willingness to have its outstanding certificates specifically restricted against the transportation of assembled automobiles, trucks, and buses. Although there is no evidence which suggests that applicant has ever, or is likely to transport such commodities as a common carrier in substituted motor for rail

service, to forestall any possibility of discrimination because of the dual operations involved, our grants here will be made subject to the condition that applicant request in writing the imposition of a restriction against the transportation of automobiles and trucks in its outstanding certificates in No. MC-78786 and various subnumbers thereto which are not specifically restricted against such transportation. However, our approval of the dual operations at this time should not be construed as any waiver of our right to reconsider this issue at any future date should the present facts change so as to bring about an improper competitive situation or result in improper discrimination or preference."

As indicated above, the Commission in its present decision also adopted and incorporated by reference its findings in this connection which were made in its prior report in the Sub. 34 proceedings. In that prior report of May 8, 1957, the Commission made the following subordinate findings in this connection (J.S. 87-88):

"In other respects however, we agree with applicant. Chevrolet, unlike other General Motors divisions for reasons satisfactory to it, definitely prefers to use contract carriers. We have no desire to coerce it into any different position or control its decision in any way. *Applicant's past satisfactory performance in a dual capacity has been without criticism.* These facts plus the fact that it is only serving a single shipper as a contract carrier and would not appear by the grant of authority here considered to be able to do otherwise, the fact that a denial of the instant application would deprive that shipper of a needed service which no other motor carrier is in a position to perform, and the lack of opposition on the part of other carriers, convinces us that we properly may approve the resultant dual operations." (Emphasis added.)

The determination which the Commission is required to make under section 210, which on its face is not an absolute prohibition, is merely another of the numerous determinations which Congress has entrusted to the Commission's expert judgment and discretion. As in the case of such other determinations, it is settled that the Commission's determinations under section 210 are binding upon the courts if rationally supported by adequate findings for which there is substantial support in the evidence. *Fine & Jackson Trucking Corp. v. United States*, 65 F. Supp. 443 (D. N.J. 1946); *Ziffrin, Inc. v. United States, supra*. Certainly, as indicated below, such is plainly the situation here.

As recognized by the Commission herein and previously (*Scott Bros., Inc., Contract Carrier Application*, 32 M.C.C. 253, 256 (1942)), the vice at which section 210 is aimed is the possibility that a carrier having the right to operate both as a common and contract carrier by motor vehicle may discriminate between its shippers by charging some the regulated published common-carrier rates and charging others reduced contract-carrier rates. The Commission's findings and action here rationally support the conclusion that there would be no such possibility in the present situation, and thus support its ultimate findings that the holding of dual operating rights by PMT was consistent with the public interest and the national transportation policy. Thus, the Commission found in the prior report in the Sub. 34 proceedings, which findings are incorporated herein by reference, that PMT's past performance in a dual capacity had been satisfactory and without criticism, for which finding there is ample evidentiary support (Sub. 34 proceeding, R. 47-48). Furthermore, to forestall any possibility of discrimination, as above indicated, the Commission required PMT to waive specifically any rights it might have to transport as a common carrier, automobiles and trucks, the only commodities which

it was herein authorized to transport as a contract carrier, and PMT has since complied with this requirement. Finally, the Commission even guarded against the possibility of any future discrimination by providing that it retained the right to "reconsider this issue at any future date should the present facts change so as to bring about an improper competitive situation or result in improper discrimination or preference."

One further point should be made. The Commission, under the plain language of section 210, was not authorized to, and could not, deny PMT a contract-carrier permit merely because its rail parent was a common carrier by railroad of the same commodities. By its terms section 210 applies only to dual operations by the same or affiliated persons as common and contract carriers by motor vehicle. To hold that a rail subsidiary could not be granted a contract carrier permit to transport a particular commodity merely because its rail parent transports the same commodity as a common carrier by rail, would, in practical effect, bar such a subsidiary from ever engaging in motor contract carriage, which Congress has never seen fit to declare to be the law. This is for the reason that rail common carriers, unlike motor common carriers, have a common law and a statutory obligation to transport all commodities presented and can never lawfully waive their rights to transport even a single commodity. In any event, however, it is apparent that the Commission in its report in discussing section 210 did consider the possibility that rail operations could be performed for the same shipper, GM, by PMT's parent, SP, which PMT could serve in its common and contract carrier by motor vehicle operations, when it said (J.S. 72):

> "As indicated, the granting of the instant applications would allow applicant to serve the same shipper both as a contract and common carrier by motor vehicle

and, *through its parent, as a common carrier by rail.*" (Emphasis added.)

Also, the Commission in connection with its discussion of section 209(b) thoroughly considered PMT's right to a permit in the light of its relationship with SP and adequately restricted the permit authorized merely because of this relationship.

Finally, it should be noted that appellants made this same argument before the District Court (J.S. 28) and that court thoroughly rejected the idea that the Commission had not given proper weight to the policies embodied in section 210 or other pertinent statutory provisions. Thus, it said (J.S. 36-37):

> "That the Commission did apply the Act as a whole, giving effect to the policies underlying §§ 5(2)(b), 207, and 210, as well as carefully following the guide laid down by the Congress in § 209(b) for determining public interest and compliance with the national transportation policy, is borne out not only by the findings of fact recited in the Commission's order, but by its conclusions as to the scope of extended operations which would be in the public interest, and by the curtailed authority which the Commission granted. It will be observed that the requested authority was denied where it would encroach upon existing service by other carriers, and granted where the evidence of record showed that the proposed extension would have little or no effect upon present and future operations of the protestants."

CONCLUSION

To set aside the decisions of the District Court and the Commission would have the following results: (1) to terminate a service which has been in effect since November 24, 1958, and which has been found by both the Commission and the District Court to be consistent with the public interest and the national transportation policy; (2) to terminate a relatively minor extension of contract carrier service which is restricted to rail points, whereas that which PMT has performed in intrastate commerce since December 10, 1935, with approval of the California Commission, and much of that which it has performed in interstate commerce under various decisions of the Interstate Commerce Commission ever since 1944 are completely unrestricted (J.S. 24-25); and (3) to disapprove contract carrier service by a railroad subsidiary, which is more restricted than that approved by the Commission for a subsidiary of Pennsylvania Railroad as long ago as 1942. *Scott Bros., Incorporated, Extension of Operations—Jersey City*, 34 M.C.C. 163 (1942).[13] All this would be done at the request of appellants who, the District Court has found (J.S. 40), made "no showing of actual or anticipated direct injury" from the Commission's order. In view of the clear balance of equities against appellants, in view of the fact that their appeal seeks to raise issues which, for the most part, are purely fictitious because based on an obvious misconception of what the Commission did, and in view of the complete lack of merit of appellants' arguments, it is evident that the appeal presents no sub-

13. The Commission in its present decision said (J.S. 71): "Nothing in *Scott Bros., Inc., Extension of Operations—Jersey City, supra*, or in the proceedings in which applicant herein obtained unrestricted contract-carrier authority, is inconsistent with the foregoing."

stantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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Certificate of Service

I, ROBERT L. PIERCE, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 18th day of June, 1959, I served copies of the foregoing document on the several parties thereto, as follows:

1. On appellants, American Trucking Associations, Inc., its Contract Carrier Conference, National Automobile Transporters Association, Convoy Company, Robertson Truck-A-Ways, Inc., Hadley Auto Transport, B & H Truckaway, Western Auto Transports, Inc., and Kenosha Auto Transport Corp., by mailing copies, in duly addressed envelopes, with airmail postage prepaid, to Walter N. Bieneman, Esq., 2150 Guardian Bldg., Detroit 26, Michigan, to Larry A. Esckilsen, Esq., 1111 E Street, N.W., Washington 4, D.C., to Charles W. Singer, Esq., 1825 Jefferson Place, N.W., Washington, D.C., and to Peter T. Beardsley, 1424 Sixteenth Street, N. W., Washington, D.C.

2. On the United States, by mailing copies, in duly addressed envelopes, with airmail postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D.C., and Willard R. Memler, Esq., Department of Justice, Washington 25, D.C.

3. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and James Y. Piper, Esq., Assistant General Counsel, at the offices of the Commission, Washington 25, D.C.

ROBERT L. PIERCE